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Recent Developments in American Indian Law

RECENT DEVELOPMENTS

UNITED STATES SUPREME COURT

CONSTITUTIONAL POWER: Religious Freedoms or Free Exercise

City of Boerne v. Flores, No. 95-2074, 1997 WL 345322 (U.S. June 25, 1997).

Due to a growing congregation, the St. Peter Catholic Church in Boerne, Texas wished to expand its small church. However, under a local zoning ordinance, the building was declared a historical site, and the city refused to grant the permit.[1] The Archbishop of the church challenged the denial as, *inter alia*, a burden on the free exercise of religion in violation of the Religious Freedom Restoration Act (RFRA).[2] The district court held that by enacting RFRA Congress had overreached the scope of its power under Section 5 of the Fourteenth Amendment.[3] The Fifth Circuit reversed this holding,[4] and the Supreme Court granted certiorari.[5]

The issue before the Court did not center on religious freedoms or free exercise; rather, the issue centered on power. Justice Kennedy, citing *Marbury v. Madison* and the Federalist Papers, framed the issue as whether Congress had overstepped its bounds in passing RFRA.[6] Did Congress go beyond its enforcement power of the Fourteenth Amendment by enacting a nonremedial, definitional law which sought to legislate constitutional principles of religious freedom? To this question, the court answered yes.[7]

In a 6-3 decision, the Supreme Court struck down RFRA, reversing the Fifth Circuit. In doing so, the Court upheld the precedent of *Oregon v. Smith*.[8] In *Smith*, the Court held that laws of general applicability may be applied to religious practices even when not supported by a compelling governmental interest.[9] RFRA was enacted as a direct response to this controversial holding in an attempt to do legislatively what the Court refused to do judicially; make exceptions for religious practices in laws of general

1. City of Boerne v. Flores, No. 95-2704, 1997 WL 345322, at *3 (June 25, 1997).
2. *Id.* (citing Religions Freedom Restoration Act of 1993, 42 U.S.C. § 2000.bb (1994)).
3. *Id.* at *3. Section 5 of the Fourteenth Amendment to the Constitution is known as the "enforcement clause." This clause grants Congress the power to pass laws which enforce the Due Process and Equal Protection rights of citizens. *Id.* at *6-7.
4. *Id.* at *3.
5. *Id.*
6. *Id.* at *6.
7. *Id.* at *16.
8. *Id.*
9. *Id.* at *4.

applicability.[10] RFRA required courts to use the compelling interest test and the least restrictive means test when examining cases claiming substantial burdens on religious exercise.[11] The Supreme Court, however, found this to be a serious congressional violation of the separation of powers and, therefore, unconstitutional.[12]

Justice Kennedy, writing for the majority, characterized RFRA as a "considerable congressional intrusion" into the police power of the states, as well as an intrusion on judicial authority.[13] Kennedy further stated: "Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."[14] In other words, Congress has tread on judicial turf, and the Court will not allow it.

In arriving at this decision, the Court determined that RFRA went beyond Congress' enforcement power.[15] Congress may only pass laws which deter or remedy constitutional violations as part of its Fourteenth Amendment enforcement power.[16] The Court found this power to be remedial only and not an affirmative source of power for Congress to legislate judicial wrongs.[17] In short, Congress may not interpret the Constitution, and as explained by Justice Kennedy, "Congress does not enforce a Constitutional right by changing what the right is. It has been given power 'to enforce,' not the power to determine what constitutes a constitutional violation."[18]

The Court stated that RFRA was not a permissible, remedial measure because its means were out of proportion to its ends.[19] The usage of strict scrutiny and a heavy evidentiary burden on the state is unreasonable in light of the relatively rare occasions of deliberate religious persecution.[20] The Court differentiated this religious claim from the civil rights claims of the sixties in that there is no widespread pattern of religious discrimination in this country.[21] However, because African-Americans were subject to pervasive, widespread laws of discrimination, Congress was given more latitude to remedy the situation.[22] RFRA, however, remedies no such history of religious discrimination in this country.[23]

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10. *Id.* at *5.
11. *Id.*
12. *Id.* at *16.
13. *Id.*
14. *Id.*
15. *Id.* at *7.
16. *Id.*
17. *Id.* (citing South Carolina v. Katzenbach, 383 U.S. 300 (1988)).
18. *Id.* at *8.
19. *Id.* at *14.
20. *Id.* at *13.
21. *Id.*
22. *Id.*
23. *Id.*

In this case, the Supreme Court asserted its judicial review to strike down an Act of Congress. In doing so, the Court reasserted its holding in *Smith* that laws of general applicability apply to all citizens regardless of an incidental burden on Free Exercise. Congress' attempt to reinsert strict scrutiny in such cases was rejected. Indeed, RFRA will no longer protect religious claims, such as the Archbishop's claim for relief. Also, many religious claims of Native American importance, such as prisoners' rights to practice religion, hair length in schools and prisons, peyote use, and bald eagle feather protection, will no longer be able to seek the protection of RFRA to avoid local laws of general applicability. Many cases, especially in the area of eagle feather possession, have been recently decided using RFRA as law. These cases are now subject to the lesser standards of the *Smith* case.

Dissenting opinion of Justice O'Connor

Justice O'Connor, who also dissented in *Smith*, argued that this case was wrongly decided because the Court had misinterpreted the Free Exercise clause of the First Amendment.[24] O'Connor cited many examples to illustrate that throughout history religious freedom has prevailed over legislative acts burdening religion.[25] Free Exercise, in O'Connor's view requires accommodation, whenever possible, to guarantee the right to participate in religious activities.[26] As such, O'Connor argued that religion is to be respected and not merely tolerated when it does not conflict with a generally applicable law.[27] Justice O'Connor concluded by maintaining "that it is essential for the Court to reconsider its holding in *Smith* . . . in this very case" and would "direct the parties to brief this issue and set the case for [re]argument."[28]

Mike Carr

LAND RIGHTS: Quiet Title Action Against the State

Idaho v. Coeur d'Alene Tribe of Idaho, No. 94-1474, 1997 WL 338603 (U.S. June 23, 1997).

The Coeur D'Alene Tribe of Idaho (the Tribe) alleged ownership of the submerged lands and bed of Lake Coeur d'Alene and various related navigable tributaries lying within the boundaries of the Coeur d'Alene Reservation (the submerged lands).[29] The Tribe brought suit in federal court against the State of Idaho (the State), several state agencies and various state officials in their

24. *Id.* at *21.
25. *Id.* at *25.
26. *Id.* at *32.
27. *Id.*
28. *Id.*
29. Idaho v. Couer d'Alene Tribe of Idaho, No. 94-1474, 1997 WL 338603, at *1 (June 23, 1997).

individual capacities, seeking exclusive rights of occupancy, use and quiet enjoyment of the submerged lands and nullification of all Idaho statutes relating to their regulation and use.[30] In addition, the Tribe sought to enjoin the defendants from taking any actions in violation of its ownership interests in the submerged lands.[31] The State moved to dismiss the Tribe's complaint based on Eleventh Amendment immunity. The District Court granted the State's motion and declared that Idaho was in rightful possession of the submerged lands.[32] On appeal, the Ninth Circuit affirmed the lower court's dismissal of the claims against the State and its agencies but reversed with regard to the claims against the individual state officials.[33] The Court of Appeals found the doctrine of *Ex parte Young* applicable to the declaratory and injunctive claims against the state officials insofar as the claims sought to preclude continuing interference with the Tribe's alleged ownership rights.[34]

A sharply divided Supreme Court reversed the appellate court's finding of the applicability of *Young*. The majority held that granting the Tribe's requested relief against the individual officials would abrogate the sovereign interests of the State, thus the Tribe could not avail itself of the *Young* exception.[35] The Eleventh Amendment immunity privilege, therefore, allowed the State to insist upon answering the Tribe's claims in its own courts and the case was remanded.[36]

Regarding immunity, the Court concluded that the Tribe maintained the same status as other foreign sovereigns against whom the State enjoys the Eleventh Amendment immunity privilege.[37] Accordingly, the Tribe's suit is barred from federal court unless it falls within the exception recognized by the Court in *Ex parte Young*.[38] The *Ex parte Young* exception allows certain suits seeking declaratory and injunctive relief against state officials in their individual capacities to be brought in federal court, despite the Eleventh Amendment's immunity provision.[39] The Court cautioned that the exception cannot be applied in every case which requests such relief[40] because a suit commenced against state officials as individual parties can nonetheless

30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at *18.
36. *Id.*
37. *Id.* at *6.
38. *Id.*
39. *Id.*
40. *Id.* at *7.

implicate state interests.[41] Therefore, a careful balancing and accommodation of state interests must accompany any potential *Young* application.[42]

While the Tribe's request for prospective relief from ongoing violations of federal law would ordinarily be sufficient to invoke the *Young* exception, the Court found the Tribe's suit to be the functional equivalent of a quiet title action against the State.[43] Such an action would shift virtually all benefits of ownership of the submerged lands from the State to the Tribe and infringe upon Idaho's sovereign authority over a vast reach of land and water within its territorial boundaries.[44] The Court found this situation to preclude the availability of the *Young* exception.[45]

In concluding that the submerged lands are within the State's sovereign domain, the Court relied upon both statutory and case law. One case cited by the Court designated lands underlying navigable waterways as "sovereign lands"[46] while another bestowed upon the States the "absolute right to all their navigable waters and the soils under them for their own common use."[47] The Court also recognized an Idaho statute which declares the natural waters and waterways within the State to be State property[48] as well as specific statutory provisions relating to State rights to both the waters[49] and the shores[50] of Lake Coeur d'Alene.

The Tribe, on the other hand, claimed beneficial interest in the submerged lands based on Lake Coeur d'Alene's inclusion within the original boundaries of the Coeur d'Alene Reservation and unextinguished aboriginal title.[51] The Court took only cursory notice of the Tribe's interests, however, before declaring the disputed lands to be within the sovereign province of the State and refusing to apply the *Young* doctrine to the Tribe's claims.[52] The case was then remanded to a State forum.[53]

Justice O'Connor, with whom Justice Scalia and Justice Thomas join, concurring in part and concurring in the opinion.

In her concurrence, Justice O'Connor agreed that the Tribe's suit was the functional equivalent of a quiet title action which sought to take the

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41. *Id.* at *6.
42. *Id.* at *12.
43. *Id.* at *14.
44. *Id.*
45. *Id.*
46. *Id.* at *15 (citing Utah Div. of States Lands v. United States, 482 U.S. 193, 195-198 (1987)).
47. *Id.* (citing Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 410 (1842)).
48. *Id.* at *18 (citing Idaho Code § 42-101 (1990)).
49. *Id.* (citing Idaho Code § 67-4304 (1989)).
50. *Id.* (citing Idaho Code § 67-4305 (Supp. 1996)).
51. *Id.* at *3 (citing Executive Order of November 8, 1873, *reprinted in* 1 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 837 (1904)).
52. *Id.* at *18.
53. *Id.*

submerged lands completely out of the State's sovereign jurisdiction.[54] O'Connor rejected the Tribe's ownership claim and agreed that the relief sought would effectively vest title in the Tribe.[55] Since the Tribe cannot maintain an action in federal court which seeks to divest the State of a property interest, O'Connor concurred with the majority's finding that the issue should be excluded from federal jurisdiction.[56]

O'Connor did find fault, however, with the majority's central conclusion that a case-by-case balancing approach is appropriate for determining the application of the *Young* exception to the Eleventh Amendment's jurisdictional limitation.[57] Finding this analytical method too vague, O'Connor suggested that a straightforward inquiry into ongoing federal law violations and a proper request for prospective relief would be a better approach for determining the applicability of *Young*.[58] Despite her disapproval of the plurality's mode of analysis, O'Connor nonetheless found that the *Young* exception could not be extended to the Tribe's case.[59]

Justice Souter, with whom Justice Stevens, Justice Ginsburg and Justice Breyer join, dissenting.

In his dissent, Justice Souter contended that the Tribe's suit falls squarely within the *Young* doctrine and that the Federal District Court was obligated to hear the case.[60] Souter argued that *Young* applies because the Tribe satisfied the two conditions necessary for maintaining a federal court action against individual state officials.[61] First, the officials are operating in violation of federal law.[62] Both the Tribe and the State claim ownership of the submerged lands based on federally granted rights and the parties agreed that the lands are governed by federal law.[63] The officials, therefore, by applying Idaho state laws, were engaging in ultra vires activities contrary to federal law.[64]

Second, *Young* requires a request for prospective, not retrospective, relief.[65] The Tribe requested future injunctive measures but did not seek damages for past infringement on tribal interests.[66] Even if a victory by the Tribe would have an incidental economic effect on the State, Souter urges that

54. *Id.* at *19.
55. *Id.*
56. *Id.* (citing Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 699 (1982)).
57. *Id.* at *22.
58. *Id.* at *24.
59. *Id.*
60. *Id.*
61. *Id.* at *25.
62. *Id.*
63. *Id.* at *26.
64. *Id.*
65. *Id.* at *25 (citing Edelman v. Jordan, 415 U.S. 651, 644 (1974)).
66. *Id.* at *28.

the cessation of illegal actions by the State officials should be the paramount concern.[67]

Souter concluded that ongoing violations and prospective relief, if successfully proven by the Tribe, would constitute "'precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*'"[68] Thus, nothing in the majority's opinion justified the preclusion of a federal forum for the Tribe's claim against the State officials.[69]

Kathleen Smith

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

POWER TO TAX: Tribal government taxation power in its territory.

State of Alaska v. Native Village of Venetie, 101 F.3d 1286 (9th Cir. 1996)

The State of Alaska, Yukon Flats School District, and Nesser Construction appealed the outcome of a remanded hearing of the suit against the Native Village of Venetie (Venetie I).[70] Venetie attempted through the Tribal court system to collect a business tax on Nesser Construction.[71] However, the State of Alaska, who was responsible for payment of the tax, filed suit in Federal Court to enjoin Venetie from collecting the tax.[72]

Venetie I: The Native Village of Venetie (Venetie) consists primarily of descendants of the Neets'aii Gwich'in, a group of Native Alaskans.[73] In 1940, the Neets'aii Gwich'in adopted a constitution providing for Venetie to be the governing authority for a 1.8 million acre reserve.[74] Subsequent to the 1971 enactment of the Alaska Native Claims Settlement Act (ANCSA), Congress conveyed title to the Venetie Reservation.[75] The Native Village of Venetie, current title holder of the Venetie Reservation lands, passed a 1986 Business Activities Tax.[76] This five percent tax authorized Venetie to collect on gains arising from commercial activity within the village.[77]

The Nesser Construction Company (Nesser) contracted with the State of Alaska through the Yukon Flats School District to build a school within the

67. *Id.*
68. *Id.* at *29 (quoting Papasan v. Allain, 478 U.S. 265, 282 (1986)).
69. *Id.* at *35.
70. State of Alaska v. Native Village of Venetie, 101 F.3d 1286, 1290 (9th Cir. 1996).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 1289 (citing 25 U.S.C. § 476).
75. *Id.* (citing 43 U.S.C. § 476).
76. *Id.* at 1290.
77. *Id.*

boundaries of Venetie.[78] Venetie assessed the five percent tax or $166,203 against Nesser.[79] When Venetie filed suit in tribal court to collect the assessed taxes, the state, being the party responsible for paying the tax, refused to defend in tribal court.[80] Instead, the state filed suit in Federal Court claiming that the Tribe lacked jurisdiction to impose a tax and enjoining the Tribe from further enforcement.[81] In *State of Alaska v. Native Village of Venetie*, the court held that in order to impose the tax on nonmembers, Venetie must be a federally recognized tribe and it must inhabit Indian country.[82] However, on remand, the district court formulated a four-part inquiry determining that Venetie is a tribe but does not inhabit Indian country pursuant to the transfer of title under ANCSA.[83]

Venetie II: The issues on appeal include (1) whether the district court formulated and applied too restrictive a standard in determining that Venetie does not inhabit Indian country; (2) whether ANCSA extinguished Indian country in Alaska; and (3) whether Venetie continues to occupy Indian country and therefore retains authority to assess a tax within its boundaries.[84]

Indian Country. The Court reviewed Congress' definition of Indian country summarized as (a) lands within an Indian Reservation, (b) all dependent Indian communities, and (c) all Indian allotments.[85] The Court determined that, although Venetie could not be classified as a reservation nor as an allotment, precedent existed to classify Venetie as a dependent Indian community.[86] The Court explained that a tribe may hold fee simple title to land and that holding title does not "preclude a finding that the land was 'set aside' by the government."[87] Further, the Court indicated that federal superintendence should be liberally construed.[88] Thus, the unchallenged state jurisdiction and noncontinuous federal supervision will not eliminate Indian country.[89] These two general factors were used to identify Venetie as a dependent Indian community.[90]

The Court determined that the two general factors - the land must be set aside for the use of Indians and the Native inhabitants must be under federal superintendence - must be given a broad interpretation.[91] Further, the Court

78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* (citing 856 F.2d 1384 (9th Cir. 1988)).
83. *Id.*
84. *Id.*
85. *Id.* at 1291 (citing 18 U.S.C. § 1151).
86. *Id.*
87. *Id.* (citing United States v. Sandoval, 231 U.S. 28, 48 (1913)).
88. *Id.*
89. *Id.* at 1296-1300.
90. *Id.*
91. *Id.* at 1291 (citing Oklahoma Tax Comm'n v. Citizen Band of Potawatomie Indian

required that on remand the lower court apply the six part analysis it suggested in *Venetie I*.[92] The six part analysis supports the broad interpretation of the two general factors: "(1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies toward that area; (4) the degree of federal ownership of and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples."[93]

ANCSA and Indian Country in Alaska. The Court explained that the land set aside under ANCSA included lands for Alaska Natives.[94] The village corporation established under ANCSA qualifies as Native Alaskan because only Natives were allowed to own and manage the village corporations for twenty years from the enactment of ANCSA.[95] The Court demonstrated that monetary distributions to business entities differ significantly from land grants to village corporations because of the Natives' historical ties to the land they inhabit.[96] Further, the Court maintained that the village corporation restricted to Native ownership was conferred by Congress and thus satisfies the set aside requirement.[97]

With regard to federal superintendence, Native village corporations are subject to federal controls where a privately owned corporation is not.[98] The articles of incorporation and bylaws must be approved by the federal government, and may not be amended without the approval of the Secretary of Interior.[99] The Court explained that although ANCSA fosters Native self-determination and autonomy, it in no way interferes with the unique relationship that Native Americans share with the federal government.[100] Indeed, the Court claimed that ANSCA was "a unique and innovative attempt to meet" the special responsibility it has toward Native American citizens and "marks a genuine endeavor to facilitate Native self-determination by providing for the direct involvement of Alaska Natives in the management of their affairs."[101]

Tribe, 498 U.S. 505, 511 (1991); United States v. John, 437 U.S. 634, 649; United States v. McGowan, 302 U.S. 535, 539 (1938); United States v. Pelican, 232 U.S. 442, 449 (1914)).

92. *Id.* at 1292.
93. *Id.*
94. *Id.* at 1297.
95. *Id.* (citing 43 U.S.C. § 1606(h)(1)).
96. *Id.* at 1295.
97. *Id.*
98. *Id.* at 1298 (citing 43 U.S.C. § 1606(e)).
99. *Id.* (citing 43 U.S.C. § 1606 (h)(1)(B)).
100. *Id.* at 1302.
101. *Id.*

The Court held that ANCSA did not eliminate Indian country in Alaska and that it may still exist.[102] Further, the application of the six-factor analysis indicated that Venetie met the set aside and superintendence requirements.[103] Therefore, the Court concluded that Venetie is a dependent Indian community and that its territory qualifies as Indian country.[104] The lower court's judgment was reversed and remanded.[105]

Cindy Hill

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BREACH OF FIDUCIARY DUTY: Breach by the State of Utah

Pelt v. State of Utah, 104 F.3d 1534 (10th Cir. 1996)

In a class action, Jack C. Pelt (Pelt) and the Navajo Nation, Intervenor, sued the State of Utah for breach of its fiduciary duty.[106] Under The Act to Permanently Set Aside Certain Lands in Utah as an Addition to the Navajo Reservation (the Act), Congress directed that 37-1/2% of any net oil and gas royalties, accruing from the Aneth Extension paid to the State of Utah, should be utilized for the benefit of Indians residing therein.[107] The Aneth Extension, a strip of land added to the Navajo Reservation, has a distinct history predicated on the divergence of the Navajo Tribe.[108] One group of Navajos settled on a reservation (Western Navajo Indian Reservation) and another fled north into areas of Utah such as the Aneth Extension.[109] However, the beneficiary class was expanded in 1968 to include all Navajo residents of San Juan County, Utah.[110]

The controversy arises from the diverse positions of the Plaintiffs, the Navajo Tribe, and the administration of the San Juan County Navajo royalty fund by the State of Utah. The two issues before the Appellate Court include (1) whether Plaintiffs, the Tribe, or both have a cause of action for breach of duty against the State under the 1933 Act and (2) what rights are to be

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. Pelt v. State of Utah, 104 F.3d 1534, 1537 (10th Cir. 1996).
107. *Id.* at 1538 (citing Act of Mar. 1, 1933, ch. 160, 47 Stat. 1418, 1418-19, as amended by, Act of May 17, 1968, Pub. L. No. 90-306, 82 Stat. 121, 121).
108. *Id.*
109. *Id.*
110. *Id.* at 1539.

vindicated by the cause.[111] A secondary issue arises in determining whether the Tribe may bring a cause of action instead of the United States.[112]

Individual Plaintiffs. The State, arguing that the Plaintiffs have no right of action under the Act, used *Cort v. Ash* to support its argument.[113] In *Cort*, the Supreme Court formulated a four-part test in determining whether a party has an implied right of action.[114] In applying the test, a Court must determine "(1) whether the statute creates a federal right in favor of the plaintiff; (2) whether there is any legislative intent, either explicit or implicit, favoring the creation or the denial of the right; (3) whether the right is consistent with the legislative scheme and its underlying purposes; and (4) whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the states, so it would be inappropriate to infer a cause of action based solely on federal law."[115]

The Court applied the first inquiry of the *Cort* test to the case at bar and found that the Act and the subsequent amendment were for Plaintiffs' benefit.[116] Utilizing previous decisions,[117] the Court found that the fund was not intended for the Navajo Tribe as a whole.[118] Even after Congress enlarged the beneficiary class in the amended provision, Congress did not curtail the rights of current beneficiaries under the Act.[119] Therefore, explained the Court, the Aneth Navajos are one of the primary beneficiaries under the Act.[120] The Court held that the Plaintiffs are one of the class or beneficiaries for whose benefit the Act was intended.[121]

The Court, combining the second and third *Cort* inquiries, found that Congress intended the fund to operate in a manner comparable to a common law trust.[122] The framework of the Act closely follows the common-law trust structure and the definition of a Trust as defined by the Second Restatement of Trusts.[123] Therefore, the Court determined that if the Act resembled a trust and was intended to act as a trust, then the beneficiaries of the trust would have a cause of action against the Trustee (the State) in the event of

111. *Id.* at 1540.
112. *Id.* (pursuant to 28 U.S.C. § 1362).
113. *Id.* at 1541.
114. *Id.*
115. *Id.* (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)).
116. *Id.*
117. *Id.* at 1541-42 (citing State of Utah v. Babbit, 53 F.3d 1145, 1149 (10th Cir. 1995); Sakezzie v. Utah Indian Affairs Comm'n, 198 F. Supp. 218 (D. Utah 1961); Sakezzie v. Utah State Indian Affairs Comm'n, 215 F. Supp. 12 (D. Utah 1963)).
118. *Id.* at 1542.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

a breach.[124] The Court held in favor of Plaintiffs under the second and third *Cort* inquiries.[125]

Finally, under the fourth inquiry of *Cort*, the Court indicated that the issue at bar falls under the realm of the federal courts, pointing out that the care of Native Americans is a uniquely federal question.[126] The Court held that Congress intended to create a discretionary trust for the benefit of the San Juan Navajos with the State of Utah as trustee using the 37 1/2% royalties as the corpus.[127]

The Tribe. The Tribe offered two arguments in support of its argument that the Tribe could stand in place of the United States. First, the royalties flow through the Tribe, and thus, the Tribe has standing to sue the State for breach of its fiduciary duty.[128] Second, the Tribe may stand in place of the United States to litigate a case.[129] The Court disagreed stating that the royalties were created for the benefit of the Aneth resident Indians and not for the Navajo Reservation.[130] The fact that the beneficiaries' of the Act were Navajos does not vest a right in the Tribe.[131] Therefore, the Court held that the Tribe cannot step into the shoes of the United States, and the district court's dismissal of the Tribe's complaint was proper.[132]

The Court reversed the district court's dismissal of Plaintiffs' complaint and affirmed the district court's dismissal of the Tribe's complaint.[133] Reversed in part, affirmed in part, and remanded.[134]

Cindy Hill

VALID OSAGE CONSTITUTION: Federal Courts and Tribal Constitutions

Fletcher v. United States, No. 95-52078, 1997 WL 309902 (10th Cir. 1997)

In March 1990, Plaintiffs, William S. Fletcher and three others of Osage descent, sued on behalf of all unallotted Osage descendants.[135] They challenged the validity of the 1881 Osage Constitution, and the restriction on the unallotted descendants' right to vote in tribal elections, (including holding

124. *Id.* at 1543.
125. *Id.* at 1544.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 1545. The Tribe cited 28 U.S.C. § 1362 (1994) to support their contention. *Id.*
130. *Id.*
131. *Id.* (citing Blatchford v. Native Village of Noatak, 501 U.S. 775, 784 (1991)).
132. *Id.*
133. *Id.*
134. *Id.*
135. Fletcher v. United States, No. 95-5208, 1997 WL 309902, at *1 (10th Cir. 1997).

tribal office), and right to receive a share of tribal income.[136] The allotted Osage and descendants consist of those Osage Indians whose names appeared on the 1908 membership roll.[137] Only the allotted tribal members are allowed to vote, hold office, and receive tribal income.[138] Tribal income derives from a trust fund whose corpus consists of the Osage mineral estate and proceeds from the sale of Osage lands in Kansas.[139]

In a previously decided case, the court upheld the Osage Tribal Council's governing powers.[140] However, the issues of validity of restriction of the franchise to headright or allotted owners and the validity of the 1881 Constitution remained open to litigation.[141] These issues were raised by Plaintiffs before the district court. Subsequently, in August, 1990, Tribal Defendants[142] moved to dismiss for lack of subject matter jurisdiction invoking Tribal sovereign immunity.[143]

For more than five years, the district court ignored Defendants' motions to dismiss in the face of its overzealous protection of a perceived voting rights issue.[144] Instead, the district court established a commission and charged it with revising the 1881 Osage Constitution.[145] Subsequent to a court ordered referendum, the revised Constitution was voted on and approved by a majority of a greatly expanded Osage electorate.[146] Finally, in September, 1995, the district court's final order "declared moot Tribal Defendants' motion to dismiss on the ground of sovereign immunity."[147]

Tribal Defendants argued that under the constitutional mootness doctrine this case was not moot.[148] The Court agreed with Tribal Defendants' argument stating that the sovereign immunity issue was insufficiently handled by the district court.[149] Further, the interests of the Tribal Defendants prior to the referendum were overlooked.[150] The Court stated that the district court abused its discretion in applying the doctrine of prudential mootness.[151]

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136. *Id.*
137. *Id.* (citing Act of June 28, 1906, 45 Stat. 539).
138. *Id.* (citing H.R. REP. NO. 92-963, at 8 (1972)).
139. *Id.*
140. *Id.* at *2 (citing Logan v. Andrus, 640 F.2d 629 (9th Cir. 1981)).
141. *Id.* (citing *Logan*, 640 F.2d at 270).
142. Tribal Defendants consist of Osage Tribal Council and each individual member thereof; Charles Tillman, Jr., as Principal Chief of the Osage Tribe and Individually; Edward Red Eagle, Sr., as Assistant Principal Chief of the Osage Tribe and Individually.
143. *Fletcher*, 1997 WL 309902, at *2.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at *3.
149. *Id.*
150. *Id.*
151. *Id.*

Thus, the Court held that the case is not moot because these issues represent live controversies.[152]

Plaintiffs and Federal Defendants[153] argued that the case should be dismissed based on mootness because Tribal Defendants did not seek an interlocutory appeal.[154] The Court stated that, while it is arguable that Tribal Defendants could have sought such an appeal, there is no question that they asserted the sovereign immunity defense at every critical stage of the proceeding.[155] Further, the Court explained that dismissing the appeal as moot on grounds of equity would undermine the rule that waiver of sovereign immunity must be unequivocally expressed.[156] Thus, the Court held that under the equity rationale,[157] the case at bar cannot properly be considered moot.

The Court also dismissed arguments by Plaintiffs and Federal Defendants that Tribal Defendants lacked standing to appeal due to harm resulting from the district court's final order.[158] The Court noted that the referendum process ordered by the district court which resulted in the 1994 Constitution, if left intact, would displace the Osage Tribal Council as the general government of the Osage Tribe.[159] Therefore, the Court determined that the Tribal Defendants have standing to appeal.[160]

Because the Osage Tribe itself is not named as a Tribal Defendant, the Court reviewed the question of when a party can assert sovereign immunity.[161] Tribal immunity like state and federal immunity are all treated the same; claims against the sovereign protects all officials of the sovereign in their official capacity.[162] The Court reasoned that because Plaintiffs sued the members of the Osage Tribal Council, who had been acting in their official capacity, the Tribe's sovereign immunity protects these officials.[163] The Court held that "Tribal Defendants properly and adequately challenged federal jurisdiction on the ground of tribal sovereign immunity. Tribal Defendants did not unequivocally waive the Tribe's immunity by failing to

152. *Id.*

153. Federal Defendants consist of United States of America; Bruce Babbitt, Secretary of Interior; Ada E. Deer, Assistant Secretary of Interior for Indian Affairs; Gordon Jackson, Superintendent of the Osage Indian Agency.

154. *Fletcher*, 1997 WL 309902, at *4 (citing 28 U.S.C. § 1292 (a)(1)).

155. *Id.*

156. *Id.*

157. *Id.* (citing *In re* Chareaugay Corp., 988 F.2d 322 (2nd Cir. 1993)).

158. *Id.* at *5.

159. *Id.*

160. *Id.* (citing Arizonans for Official English v. Arizona, 117 S. Ct. 1055 (1997)).

161. *Id.* at *6.

162. *Id.*

163. *Id.*

seek interlocutory review."[164] Finally, immunity from suit deprived the district court of jurisdiction.[165]

Tribal Defendants argued that only Congress can limit or expand a tribe's power of self-government.[166] The Tribal Defendants further argued that the referendum and the 1994 Constitution are invalid when viewed in light of the 1906 Act.[167] The Court stated that Congress prescribed the form of tribal government for the Osage tribe.[168] Under Congress' authorization, the Osage Tribe and its Council are imbued with general governmental authority to resolve questions surrounding the affairs of the Osage Tribe.[169] The 1994 Constitution created a new general government predicated upon separation of power similar to that of the United States of America.[170] Congress, under the 1906 Act, had already mandated the structure of the tribal government, such as the method of selecting a principal chief and tribal council.[171] Therefore, the government created by the 1994 Constitution is inconsistent with the 1906 Act and is invalid.[172]

The Court held that "[o]nly Congress has the power to permit a fundamental alteration of the prescribed form of tribal government. The results of the district court proceedings and the 1994 referendum are reversed. The right to vote in elections of the Osage Tribe is restricted to headright owners, and the form of government established by the 1994 Constitution is declared invalid."[173]

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164. *Id.* at *8.
165. *Id.*
166. *Id.* at *9.
167. *Id.*
168. *Id.* at *10.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at *11.
173. *Id.* at *15.